PROSKAUER ROSE LLP

2049 Century Park East
Suite 3200
Los Angeles, CA 90067-3206
Telephone 310.557.2900
Fax 310.557.2193

BOCA RATON
BOSTON
CHICAGO
LONDON
NEW ORLEANS
NEW YORK
NEWARK
PARIS
SÃO PAULO
WASHINGTON

Clifford S. Davidson
Albert C. Valencia
Lois D. Thompson

November 10, 2008

By Hand

Chief Justice Ronald M. George
Supreme Court of California
Ronald Reagan Building
300 South Spring Street
Los Angeles, CA 90013

Courtesy Copy To

Chief Justice Ronald M. George
Supreme Court of California
Earl Warren Building
350 McAllister Street
San Francisco, CA 94102

Re: *Strauss et al. v. Horton et al.*, No. S168047 – Amicus curiae letter on behalf of Petitioners

To the Honorable Ronald M. George, Chief Justice of California, and the Honorable Associate Justices of the California Supreme Court:

We respectfully submit this amicus curiae letter pursuant to California Rule of Court 8.500(g) on behalf of the Anti-Defamation League, Asian Law Caucus, Bet Tzedek Legal Services, Japanese American Citizens League and Public Counsel (collectively, "Amici"). Amici respectfully urge the Court to consider – and grant – the petition for writ relief submitted by Petitioners in the above-captioned matter.

I. Statement of Interest

Amici are organizations devoted to obtaining and preserving justice, civil rights and equal protection of the laws both for members of groups that have suffered discrimination for long periods of California's history and for all Californians. This letter addresses the fundamental nature of equal protection, an abiding and permanent principle upon which the People have based their Constitution and a central tenet of democratic governance. Proposition 8 is an extreme measure that subverts that fundamental principle and eviscerates this Court's constitutional authority to interpret and enforce the requirement of equal protection. Amici, many

of whose members have been subject to discriminatory laws and practices, write to urge the Court not to permit a bare majority of voters in a single election to work such a drastic alteration of our Constitutional scheme. Rather, the Court should hold that consistent with the restraints the People have imposed on themselves through the Constitution, such a dramatic step is a revision and not an amendment.

II. The Court Should Exercise Its Original Jurisdiction

In light of the serious threat posed by Proposition 8 to the core underlying principle of equal protection, there can be no question that the issue of Proposition 8's validity is "of sufficient public importance" for the Court to exercise original jurisdiction. (*Legislature v. Eu* (1991) 54 Cal.3d 492, 500.) Amici respectfully urge the Court to do so.

III. The Court Should Grant the Petition

"The provisions of the California Constitution itself constitute the ultimate expression of the People's will." (*In re Marriage Cases* (2008) 43 Cal.4th 757, 787). The People have willed that "[a] person may not be . . . denied equal protection of the laws . . . . A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens." (Cal. Const., Art. I, §§ 7(a)-(b).) Proposition 8 undermines these principles by purporting to amend the California Constitution to compel government discrimination against gay and lesbian individuals and couples based on their sexual orientation, a classification this Court has held to be suspect. (*In re Marriage Cases*, *supra*, 43 Cal.4th at pp. 840-849.) However, the People have provided that such a dramatic change may be made only through the more deliberative process of revision and not through amendment. (Cal. Const., Art. XVIII §§ 1-4 [providing that while the electorate may amend the constitution by initiative, a revision must originate with the legislature].) Proposition 8 therefore is invalid.

The principle of equal protection – and the suspect classification doctrine in particular – protects groups historically subject to discrimination based on characteristics unrelated to one's ability to participate in or contribute to society. (*Sail'er Inn v. Kirby* (1971) 5 Cal.3d 1, 19.) As this Court has held, the core of equal protection is its mandate that "the principles of law that officials would impose upon a minority must be

imposed generally." (*United States Steel Corp. v. Public Utilities Com.* (1981) 29 Cal. 3d 603, 611-612 [quoting *Railway Express Agency v. People of State of New York* (1949) 336 U.S. 106, 112 (conc. op'n. Jackson, J.)].) That requirement is the Constitution's safeguard against any tendency of majorities to exclude members of disfavored groups from basic civil rights and protections and is so fundamental to our system of government that it may not be altered other than through revision.

As discussed below, California's unfortunate history of enacting discriminatory measures based on national origin, immigration status, and race, as well as ongoing efforts to deprive disfavored minorities in California of basic rights and protections, underscore the importance of enforcing the restraints that the People of California wisely have imposed upon themselves through requiring more expansive deliberation before revising the Constitution than before amending it.

A. Adjudging Proposition 8 a Revision, Rather Than an Amendment, Comports with the Restraints the People Placed on the Initiative Power in Article XVIII of Our Constitution.

When first considering the distinction between "revision" and "amendment," this Court emphasized, in *Livermore v. Waite* (1894) 102 Cal. 113, 118, the permanence of the principles on which our Constitution rests:

> The very term 'constitution' implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicate the will of the people that the underlying principles upon which it rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature.

Proposition 8 threatens the permanent and abiding nature of the requirement that laws must apply equally to all – the most basic principle of democratic government. Respondents might argue that Proposition 8 is a simple, one-sentence alteration of the Constitution and therefore is not sufficiently far-reaching to constitute a revision. But the simplicity of a

constitutional provision says nothing of its scope. As this Court rightly observed, "even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision." (*Amador Valley Joint Union High School Dist. v. State Board of Equalization* (1978) 22 Cal.3d 208, 223.)

Proposition 8 on its face seeks to compel government discrimination against an historically disfavored group by *constitutional* decree adopted through the amendment process. The relative novelty of that proposal underscores how significantly it would alter existing constitutional principles.[1] Under this Court's precedents, such a drastic alteration of the core principle of equal protection – which would open the door to evisceration of the protections of the suspect classification doctrine – is a revision, not an amendment. As such, Proposition 8 cannot be enacted through the typical initiative process. (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 354-355; *Livermore v. Waite* (1894) 102 Cal. 113, 118-119.)

1. The History of Discrimination against Disfavored California Minorities Underscores the Importance of the Constraints the People Placed on Themselves through Article XVIII.

Official discrimination throughout California history against persons of Asian and Pacific Islander descent, as well as members of other national,

---

[1] Attempts to alter the California Constitution (as opposed to California's statutory law) to mandate official discrimination or to permit private discrimination on suspect bases have been few and far between, and amici are not aware of any California constitutional measure adopted by initiative that on its face mandated such official discrimination. The *constitutional convention* of 1879 enacted article XIX, which expressly mandated discrimination against Chinese persons in employment and other areas. Likewise, in 1964, California voters approved a constitutional amendment that was neutral on it face but sought to encourage and permit private racial discrimination in the sale and rental of housing. (See *Mulkey v. Reitman* (1966) 64 Cal.2d 529 [invalidating Proposition 14 under the federal Constitution].)

racial and ethnic groups, illustrates the wisdom of the safeguards contained in article XVIII and of applying them here. Discriminatory measures have included, among others:

- tax statutes designed to drive Chinese immigrants from the state (see, e.g., Foreign Miners' License Tax, Stats. 1852 ch. 37; Chinese Police Tax, entitled "An Act to protect Free White Labor against competition with Chinese Coolie Labor, and to discourage the Immigration of the Chinese into the State of California," Stats. 1862 ch. 339);

- statutes prohibiting persons designated as "black or mulatto . . . or Indian" from testifying "in favor of, or against, any white person" (Stats. 1850, ch. 99, p. 14 [criminal cases]; Stats. 1851, ch. 5, p. 394, subds. 3-4 [civil cases]; see also *People v. Hall*, (1854) 4 Cal. 399 (hereafter *Hall*) [upholding the constitutionality of those laws and holding that they applied to bar testimony by Chinese persons as well]; Stats. 1863, ch. 70 [codifying the decision in *Hall*]);

- statutes and ordinances barring "Negroes, Mongolians, and Indians" from public schools (see, e.g., Stats. 1860, ch. 329, p. 8) and requiring the provision of separate schools "for children of Mongolian or Chinese descent" (Stats. 1885, ch. 117, p. 1); City and County of San Francisco Order Nos. 1,569, §§ 1-3 and 1,587, § 68 (enacted Jul. 28, 1880) [cited in *Yick Wo v. Hopkins* (1886) 118 U.S. 356]; and

- statutes prohibiting marriage between "white persons [and] negroes, Mongolians, members of the Malay race, or mulattoes." (Former Cal. Civ. Code § 60, added by Stats. 1850, ch. 140, p. 424, amended by Stats. 1901, p. 335 and Stats. 1933, p. 561 [cited in *Perez v. Sharp* (1948) 32 Cal.2d 711].)

The People have enacted similar discriminatory statutes through the initiative process, as well. In 1920, for example, California voters approved an initiative that strengthened and expanded the so-called Alien Land Law, which prohibited certain immigrants who were ineligible for citizenship from owning agricultural lands. Although the initiative did not mention Japanese persons by name, it was enacted through "a campaign with a bitter anti-Japanese flavor. All the propaganda devices then known – newspapers, speeches, films, pamphlets, leaflets, billboards, and the like –

were utilized to spread the anti-Japanese poison." (*Oyama v. California*, (1948) 332 U.S. 633, 658 (conc. opn. Murphy, J.).)

Similarly, in 1964, California voters enacted Proposition 14, which amended the California Constitution to overturn recently enacted state laws prohibiting racial discrimination in housing. (See *Mulkey v. Reitman* (1966) 64 Cal.2d 529.) While Proposition 14 was facially neutral, its unmistakable purpose was to encourage and facilitate private racial discrimination in the rental and sale of residential property. This Court held that Proposition 14 violated the federal equal protection clause because the state had "affirmatively acted to change its existing laws from a situation wherein the discrimination practiced was legally restricted to one wherein it is [impermissibly] encouraged." (*Id.* at p. 542.) That decision was affirmed by the United States Supreme Court. (*Reitman v. Mulkey* (1967) 387 U.S. 369.) Because Proposition 14 was struck down on federal equal protection grounds, this Court did not consider whether it was a revision of the California Constitution. Had the Court done so, it should have invalidated Proposition 14 on that additional basis.

Unlike Proposition 14, which was couched in disingenuously neutral terms, Proposition 8 openly seeks to mandate *government* discrimination against gay and lesbian couples by incorporating into our Constitution a *facial* classification excluding such couples from marriage. Amici respectfully urge this Court not to open the door to similar future "amendments" to our Constitution by erroneously permitting such a drastic departure from the principle of equal protection to stand as an amendment.

2. Enforcing Article XVIII in This Case Preserves the Constitution as the Ultimate Expression of the People's Will.

As this Court has made clear, statutory measures enacted by initiative are subject to the same constitutional constraints as ordinary legislation. (*In re Marriage Cases*, *supra*, 43 Cal.4th at p. 851.) Accordingly, if the Legislature or the People enact a discriminatory statute, the courts can fulfill their constitutionally mandated role of enforcing the equality guarantees of the California Constitution and invalidating laws that violate those guarantees. (See, e.g., *id.* at 856 [striking law restricting women's choice of occupation under the California equal protection

clause]; *Estate of Yano* (1922) 188 Cal. 645 [invalidating provision of Alien Property Act that denied an alien parent the right to become the guardian of the estate of his native-born child, in part under the California privileges and immunities clause].) The suspect classification doctrine, enforced by the courts, thus safeguards the minority from the biases of the majority.

In the context of *constitutional* initiatives, the People, through our Constitution, have provided an analogous form of protection against enactments that would infringe upon the equal rights and dignity of minorities: the distinction between constitutional amendments, which may be enacted through the typical initiative process, and constitutional revisions, which may not. As stated above, this Court has noted that "the provisions of the California Constitution itself constitute the ultimate expression of the People's will." (*In re Marriage Cases*, *supra*, 43 Cal.4th at p. 787). Indeed, by enshrining the distinction between those two procedures in our state Constitution, "[t]he people of this state have spoken; they made it clear when they adopted article XVIII and made amendment relatively simple but provided the formidable bulwark of a constitutional convention as a protection against improvident or hasty (or any other) revision, that they understood there was a real difference between amendment and revision." (*McFadden v. Jordan* (1948) 32 Cal.2d 330, 347.) "The differentiation required [between 'amendments' and 'revisions'] is not merely between two words; more accurately it is between two procedures and between their respective fields of application." (*Id.*) By requiring a more deliberative, formalized process for the enactment of measures that seek to significantly alter the underlying principles of the California Constitution or the nature of our basic governmental plan, the People have attempted to minimize the likelihood that such changes will be based on any animus or whim of a majority of voters.

Though Respondents likely will argue that Proposition 8 must be upheld in order to carry out the People's will, the opposite is true. The People have distinguished between amendments and revisions in article XVIII and have imposed on their own initiative power an important restraint to be enforced by the courts. In so doing, the People recognized that the Constitution loses its venerable status when its core principle, equal protection of the laws, can be nullified for a class of persons by fifty percent plus one of the voters participating in a single election. Amici

therefore urge the Court to respect the will of the People as currently expressed in our Constitution. Just as this Court protects the interests of minorities through the application of heightened scrutiny to laws that discriminate based on suspect classifications, this Court should recognize that a measure that seeks selectively to strip a fundamental right only from a disfavored and otherwise constitutionally protected group is a proposed revision to the Constitution and can be adopted, if at all, only through the more rigorous procedures for constitutional revision codified by the People in article XVIII.

In urging this Court to enforce that self-imposed restraint, amici do not suggest that the Court should exercise its power to deny the People the power to change the ultimate expression of their will. Rather, by subjecting Proposition 8 to the more deliberative process required for constitutional revision, this Court would prohibit enactment of that measure without undergoing the procedures mandated by article XVIII. Those procedures entail open and extensive debate in the Legislature followed by a vote of the People. Rather than silencing the People's voice, those procedures expand public consideration and discussion of the relevant issues.

B. Stripping Gay and Lesbian Individuals and Couples of Equal Protection with Regard to Marriage Jeopardizes Their Right to Equal Protection in All Areas

If the initiative process can be used to change the California Constitution to strip gay and lesbian individuals of the fundamental right to marry, then that process also can be used to strip gay and lesbian people of any and all state constitutional rights, such as the right to parent, to work in certain professions, or even to enter into private consensual relationships. This is anathema to the fundamental right to equal protection of the laws, which, like our Constitution as a whole, is premised upon the inherent dignity, personhood, and equality of the individual. (See, e.g., Cal. Const., art. I § 1.)

While it is true that such measures might violate the federal Constitution, the People of California should not have to depend on the federal Constitution or federal Supreme Court to protect their basic civil rights. Our Constitution must continue to be an independent guarantor of such rights. (See, Cal. Const., art. I, § 24; *People v. Hannon* (1977) 19

Cal.3d 588, 607 fn. 8 [calling the California Constitution "a document of independent force and effect particularly in the area of individual liberties"].) As this Court held in *Raven v. Deukmejian*, a change in our state Constitution that significantly impairs both that tradition and the ability of California courts to enforce independent state constitutional guarantees, undoubtedly constitutes a revision of the California Constitution and not a mere amendment. (*Raven v. Deukmejian*, *supra*, 52 Cal.3d at p. 352.)

Accordingly, in order to effectively protect individual and minority rights, the *state* guarantee of equal protection cannot be parceled out or abrogated in a particular arena; to deny gay and lesbian people equal protection with regard to the fundamental right to marry is to stigmatize them as unworthy of equal protection across the board. (*In re Marriage Cases*, *supra*, 43 Cal.4th at p. 846 ["[P]articularly in light of the historic disparagement of and discrimination against gay persons, there is a very significant risk that retaining a distinction in nomenclature with regard to this most fundamental of relationships whereby the term 'marriage' is denied only to same-sex couples inevitably will cause the new parallel institution that has been made available to those couples to be viewed as of a lesser stature than marriage and, in effect, as a mark of second-class citizenship."].)

For precisely that reason, certain national and racial groups were deprived of the most basic civil rights in early California – lest affording them equal dignity and respect in one arena would give rise to an expectation that they should be treated equally in all others. For example, in *People v. Hall*, *supra*, 4 Cal. 399, this Court considered whether a "free white" defendant could be convicted of murder based on the testimony of Chinese witnesses. The Court held, among other things, that public policy dictated that the testimony of Chinese witnesses be decreed inadmissible pursuant to a law excluding the testimony of any "Indian or Negro." (*Id.* at p. 399.) That result was necessary, the Court said, in order to deny Chinese Californians the ability to claim "not only the right to swear away the life of a citizen, but the further privilege of participating with us in administering the affairs of our Government." (*Id.* at pp. 404-405.) As the Court further explained: "The same rule which would admit [persons of Chinese descent] to testify, would admit them to all the equal rights of citizenship, and we

might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls." (*Id.* [describing Chinese persons as "a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, . . . between whom and ourselves nature has placed an impassable difference"].)

As the decision in *Hall* illustrates, when a law negates the inherent dignity and equality of a particular group in one area, that denial inevitably has far-reaching – and often devastating – effects. Proposition 8 supporters might sincerely wish to confine their discriminatory treatment of gay and lesbian people to marriage. Nevertheless, history – and this Court's suspect classification doctrine – teaches that such measures inevitably impose "the stigma of inferiority and second class citizenship." (*Sail'er Inn, supra*, 5 Cal.3d at p. 19.) Enshrining such second-class treatment in the current Constitution radically would change the fundamental nature of the freedoms guaranteed by that document.

C. Denying Equal Protection to One Group Undermines the Principles of Equal Protection for All.

Permitting Proposition 8's supporters to forego the revision process would jeopardize the freedom of all Californian minority groups – not just gay and lesbian people. If Proposition 8 can strip fundamental rights from gay and lesbian people by a bare majority, future amendments could strip away fundamental rights from other disfavored groups based on race, national origin, gender or religion. If Proposition 8 were a proper subject for an initiative vote, then so would be a measure seeking to amend the California Constitution to bar interracial or interfaith marriages, to exclude women from certain occupations, to limit freedom of speech only for certain racial or national groups, or to suspend protections against unwarranted searches and seizures for members of certain national groups. In light of the long history of discrimination against many groups in California, including persons of Asian and Pacific Island descent, this Court should not assume that introduction of such measures is far-fetched.

Again, although the federal Constitution and Supreme Court might provide protection against such enactments, Californians are entitled to the independent protections of their state Constitution. (See Cal. Const., art. I, § 24; *People v. Hannon, supra*, 19 Cal.3d at p. 607 fn. 8.) This Court

therefore should hold, consistent with *Raven v. Deukmejian*, that Proposition 8's proposed impairment of that basic principle is a revision of the California Constitution, not an amendment. (See *Raven v. Deukmejian*, *supra*, 52 Cal.3d at p. 352.)

IV. Conclusion

Through Article XVIII, the People declared that the Constitution should not be revised lightly. Because Proposition 8 undermines equal protection, a permanent and abiding constitutional principle, Proposition 8 is subject to the more deliberative revision process. Amici respectfully request that this Court exercise its original jurisdiction and grant the Petition.

Sincerely,

PROSKAUER ROSE LLP
Clifford S. Davidson (Bar No. 246119)
Albert C. Valencia (Bar No. 245630)
Lois D. Thompson (Bar No. 93245)

Clifford S. Davidson

Attorneys for the Anti-Defamation League, Asian Law Caucus, Bet Tzedek Legal Services, Japanese American Citizens League and Public Counsel.

PROOF OF SERVICE

I declare that: I am employed in the County of Los Angeles, California. I am over the age of eighteen years and not a party to the within cause; my business address is 2049 Century Park East, Suite 3200, Los Angeles, CA 90067.

On November 10, 2008, I served the foregoing document described as:

AMICUS CURIAE LETTER IN SUPPORT OF PETITIONERS

☒ by placing ☐ the original ☒ true copies thereof enclosed in a sealed envelope addressed as follows:

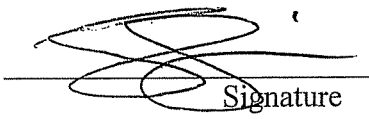
PLEASE SEE ATTACHED SERVICE LIST

☒ (By U.S. Mail) I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 10, 2008, at Los Angeles, California.

Ivania Munguia
Type or Print Name



Signature

Service List

Mark B. Horton, MD, MSPH
State Registrar of Vital Statistics
of the State of California and
Director of the California Department of
Public Health
1615 Capitol Avenue, Suite 73.720
P.O. Box 997377 MS 0500
Sacramento, CA 95899-7377
(916) 558-1700

Respondent.

Mark B. Horton, MD, MSPH
State Registrar of Vital Statistics
1615 Capitol Avenue, Suite 73.720
PO Box 997377 MS 0500
Sacramento, CA 95899-7377

Respondent.

Linette Scott, MD, MPH
Deputy Director of Health Information and
Strategic Planning of the California
Department of Public Health
1616 Capitol Avenue, Suite 74.317
Mail Stop 5000
Sacramento, CA 95814

Respondent.

NATIONAL CENTER FOR LESBIAN
RIGHTS
Shannon P. Minter
Melanie Rowen
Catherine Sakimura
Ilona M. Turner
Shin-Ming Wong
Christopher F. Stoll
870 Market Street, Suite 370
San Francisco, CA 94102

Attorneys for Petitioners.

MUNGER, TOLLES & OLSON, LLP
Gregory D. Phillips
Jay M. Fujitani
David C. Dinielli
Michelle Friedland
Lika C. Miyake
Mark R. Conrad
355 S. Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560

Attorneys for Petitioners.

LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
Jon W. Davidson
Jennifer C. Pizer
F. Brian Chase
Tara Borelli
3325 Wilshire Boulevard, Suite 1300
Los Angeles, CA 90010

Attorneys for Petitioners.

Edmund G. Brown, Jr.
California Attorney General
1300 "I" Street
P.O. Box 94255
Sacramento, CA 94244-2550

1515 Clay Street, Room 206
Oakland, CA 94612
(510) 622-2100

ACLU FOUNDATION OF NORTHERN CALIFORNIA
Alan L. Schlosser
Elizabeth O. Gill
39 Drumm Street
San Francisco, CA 94111

Attorneys for Petitioners.

ACLU FOUNDATION OF SOUTHERN CALIFORNIA
Mark Rosenbaum
Clare Pastore
Lori Rifkin
1313 W. 8th Street
Los Angeles, CA 90017

Attorneys for Petitioners.

ORRICK, HERRINGTON & SUTCLIFFE LLP
Stephen V. Bomse
405 Howard Street
San Francisco, CA 94105-2669

Attorneys for Petitioners.

ACLU FOUNDATION OF SAN DIEGO AND IMPERIAL COUNTIES
David Blair-Loy
P.O. Box 87131
San Diego, CA 92138-7131

Attorneys for Petitioners.

LIBERTY COUNSEL
Mary E. McAlister
Post Office Box 11108
Lynchburg, VA 24506

Attorneys for Proposed Intervenors.

LAW OFFICE OF DAVID C. CODELL
David C. Codell
9200 Sunset Boulevard, Penthouse Two
Los Angeles, CA 90069

Attorneys for Petitioners.